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View Esteem Sdn Bhd v Bina Puri Holdings Bhd

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FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 02(f)-11–02 OF 2017 (W)
ZULKEFLI PCA, SURIYADI, ZAHARAH IBRAHIM, BALIA YUSOF AND AZIAH ALI FCJJ
6 NOVEMBER 2017

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Contract — Building contract — Claim for payment under interim certificates — Claim referred to arbitration under Construction Industry Payment Adjudication Act 2012 ('the Act') — Adjudicator made decision in favour of respondent — Appellant applied to stay or set aside adjudicator's decision — Whether appellant right in invoking s 15 of the Act to challenge jurisdiction of adjudicator — Whether jurisdictional challenge could be made at any time — Whether s 41 of the Act operated to exclude proceedings if claim brought to court before coming into force of the Act — Whether the Act allowed responding party to raise matters not raised in payment response — Whether adjudicator bound to consider defence not raised in payment response but raised in adjudication response — Whether adjudicator's failure to consider all defences raised by appellant amounted to a breach of natural justice — Whether financial capacity of contractor to repay relevant factor for application to stay adjudicator's decision — Whether application for stay can be filed concurrently with application to set aside adjudicator's decision — Whether adjudicator's decision should be set aside or stayed

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A dispute arose between the parties over the non-payment of interim payment claims. The respondent had served a payment claim on the appellant, which the latter had failed to settle. The applicant submitted that the applicant's failure to file a payment response meant that the entire amount was deemed disputed under the Construction Industry Payment Adjudication Act 2012 ('the Act'). The respondent then proceeded with arbitration proceedings against the appellant. The appellant filed its adjudication response disputing the respondent's claim wherein it averred that the interim claims claimed by the respondent were subject to adjustments. After giving due consideration to the adjudication claim and responses thereto the adjudicator made his decision in favour of the respondent. The appellant then applied to challenge the jurisdiction of the adjudicator under s 41 of the Act ('the first application'). The respondent, on the other hand, applied for the registration and enforcement of the adjudication decision as a judgment of the court pursuant to s 28 of the Act ('the second application'). The appellant in turn applied to set aside and/or stay the award of the adjudicator pursuant to ss 15 and 16 of the Act ('the third application'). The High Court dismissed both of the appellant's applications

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(the first and third applications) and allowed the respondent's application (the second application) to enforce the adjudication decision. On appeal, the Court of Appeal affirmed all the three decisions of the High Court. The appellant has obtained the leave of this court to proceed with the present appeal which addresses the issues relating to the scope and application of the Act, which is a new legislation that came into force on 15 April 2014. It was the appellant's case that a progress claim for the sum of RM23.8m which was the subject matter of the present payment dispute ('progress claim 28') fell within the exclusion of s 41 of the Act as a claim that 'had been commenced in court or arbitration before' the Act came into operation. The basis of this contention was that progress claim 28 was cumulative of earlier progress claims contained in earlier interim certificates, in respect of which action had been commenced by the respondent against the appellant in the High Court in May 2013. The appellant also submitted that the adjudicator had erred in excluding for consideration three defences raised by the appellant, as the respondent in the adjudication process. The appellant thus contended that the adjudication decision should be stayed or set aside.

Held, allowing the appeal with costs

(1) In the present case, the appellant was correct in its contention that the error in the judgment of the Court of Appeal was its failure to recognise that the jurisdictional complaint in the present case was that the Act did not apply at all because of s 41, and not an 'excess of jurisdiction' under s 15, on the basis that the Act applied. Section 15 of the Act, which was predicated on the Act applying to an adjudication decision made under the Act, related specifically to a complaint that the adjudicator had 'acted in excess of his jurisdiction' presupposing the existence of the adjudicator's jurisdiction under the Act in the first place. In the circumstances, the appellant was right in not invoking s 15 of the Act at the beginning in making its application to challenge jurisdiction because it could not on the one hand complain that the Act did not apply to the case and yet on the other hand invoke a provision of the Act to seek relief. As such, a jurisdictional challenge could be made at any time and not only upon an application to set aside an adjudication award (see paras 11–12 & 15–19).

(2) In the present case the view taken by the adjudicator was to equate 'previous' litigation with 'on-going' litigation or arbitration. There was no importance attached to the word 'commenced … before' which are the express qualifying words found in s 41 of the Act. However, the words 'commenced' and 'before' as found in s 41 of the Act had distinct meanings and should not be equated with the word 'pending' found elsewhere in the Act. In the circumstances, both the adjudicator and the High Court had read s 41 of the Act wrongly by interpreting the exclusion thereon as applicable to pending payment disputes. This

interpretation had narrowed the scope of s 41 of the Act and was contrary to its intended operation as a saving and transitional provision. It would be sufficient to establish a right of exclusion under s 41 of the Act if the paying party demonstrated that a claim covering the present claim had previously been commenced in court or arbitration because in the construction industry, progress claims (on which interim certificates were issued) were cumulative in nature and did not exist in separate stand-alone compartments. In the present case, the contract between the parties and the progress claims did not stand alone in separate compartments but were cumulative in nature (see paras 22–36).

(3) The adjudicator had excluded for consideration three vital defences raised by the appellant, as the respondent in the adjudication process, on the grounds that they were not stated as reasons in the first payment response under s 6 of the Act, though pleaded in the adjudication response before him. An adjudicator was not excluded from considering all the defences raised by a respondent in the adjudication response whether found in the first response under s 6 of the Act. Where an adjudicator had failed to do so, he was said to be in breach of natural justice. Based on a careful consideration of ss 6(4), 15, 24, 25, 26 and 27 of the Act it was clear that an adjudicator who wrongly ruled out considering a defence presented to him would be in breach of natural justice. In the present case, the adjudicator had wrongly construed the scope of his jurisdiction under s 27(1) of the Act by refusing to consider all the defences raised in the adjudication response. Therefore, such a decision by the adjudicator could not stand (see paras 46, 51, 59–61, 64–66 & 74).

(4) The High Court and the Court of Appeal in the present case took the view that no stay was available unless the appellant could show that the respondent was unable to repay the adjudication sum. Such a stringent test was not justified under the Act. The correct approach for a stay under s 16 of the Act would be to evaluate each case on its merits without the fetter of a pre-determined test not found in the section itself namely the financial capacity of the contractor to repay. It could be a factor but not the only factor. Under s 16 of the Act the courts could stay an adjudication decision when there were clear errors, or to meet the justice of the individual case and any attempt to restrict the application of s 16 of the Act in the manner proposed by the High Court, and the Court of Appeal, would be to strip it of any utility. Further, it was wholly appropriate that an application for stay under s 16 of the Act be filed together with an application to set aside an award under s 15 of the Act. Thus, the appellant's application to set aside and/or stay the award pursuant to ss 15 and 16 of the Act should be allowed and the

respondent's application seeking the registration and enforcement of the adjudication decision ought to be dismissed (see paras 76–79, 81–84 & 88).

[Bahasa Malaysia summary

Pertikaian berbangkit di antara pihak-pihak keatas tuntutan-tuntutan bayaran interim yang tidak dibayar. Responden telah menyerahkan tuntutan bayaran ke atas perayu, yang mana perayu gagal untuk menyelesaikan. Pemohon berhujah bahawa kegagalan pemohon untuk memfailkan jawapan bayaran bermaksud bahawa keseluruhan jumlah dianggap dipertikaikan di bawah Akta Pembayaran dan Adjudikasi Industri Pembinaan 2012 ('Akta'). Responden kemudiannya meneruskan dengan prosiding timbang tara terhadap perayu. Perayu memfailkan jawapan penghukumannya mempertikaikan tuntutan responden di mana ia berhujah bahawa tuntutan-tuntutan interim yang dituntut oleh responden adalah disubjek kepada pelarasan. Selepas mengambil pertimbangan kepada tuntutan penghukuman dan jawapan-jawapan kepadanya pengadil membuat keputusannya memihak responden. Perayu kemudiannya memohon untuk mencabar bidang kuasa pengadil di bawah s 41 Akta ('permohonan pertama'). Responden, sebaliknya, memohon untuk pendaftaran dan penguatkuasaan keputusan penghukuman sebagai penghakiman mahkamah berikutan s 28 Akta ('permohonan kedua'). Perayu sebaliknya memohon untuk mengetepikan dan/atau menangguhkan award pengadil berikutan ss 15 dan 16 Akta ('permohonan ketiga'). Mahkamah Tinggi menolak kedua-dua permohonan perayu (permohonan pertama dan ketiga) dan membenarkan permohonan responden (permohonan kedua) untuk menguatkuasakan keputusan penghukuman. Atas rayuan, Mahkamah Rayuan mengesahkan kesemya ketiga-tiga keputusan Mahkamah Tinggi. Perayu telah memperolehi izin mahkamah ini untuk meneruskan dengan rayuan ini yang menangani isu-isu berkaitan skop dan penggunaan Akta, yang mana adalah undang-undang baru yang berkuat kuasa pada 15 April 2014. Ia adalah kes perayu bahawa tuntutan kemajuan bagi jumlah RM23.8 juta yang mana adalah perkara pertikaian bayaran ini ('tuntutan kemajuan 28') terangkum di dalam pengecualian s 41 Akta sebagai tuntutan yang 'had been commenced in court or arbitration before' Akta beroperasi. Asas hujahan ini adalah bahawa tuntutan kemajuan 28 adalah kumulatif terhadap tuntutan-tuntutan kemajuan terdahulu yang terdapat di dalam sijil-sijil interim terdahulu, berkaitan tindakan yanag mana telah dimulakan oleh responden terhadap perayu di Mahkamah di dalam bulan Mei 2013. Perayu juga berhujah bahawa pengadil telah tersilap dalam mengecualikan daripada pertimbangan tiga pembelaan yang dibangkitkan oleh perayu, sebagai responden di dalam proses penghukuman. Perayu oleh itu berhujah bahawa keputusan penghukuman patut ditangguh atau diketepikan.

Diputuskan, membenarkan rayuan dengan kos:

(1) Dalam kes ini, perayu adalah betul dalam hujahannya bahawa kesilapan dalam penghakiman Mahkamah Rayuan adalah kegagalannya untuk menerima bahawa aduan bidang kuasa di dalam kes ini adalah bahawa Akta langsung tidak beraplikasi kerana s 41, dan bukan 'excess of jurisdiction' di bawah s 15, atas asas bahawa Akta beraplikasi. Seksyen 15 Akta, yang mana didasarkan ke atas Akta yang beraplikasi kepada keputusan penghukuman yang dibuat di bawah Akta, secara khusus berkaitan kepada aduan bahawa pengadil telah 'acted in excess of his jurisdiction' menggandaikan kewujudan bidang kuasa pengadil di bawah Akta pada mulanya. Dalam keadaan, perayu adalah betul kerana tidak membangkitkan s 15 Akta pada mulanya dalam membuat permohonannya untuk mencabar bidang kuasa kerana ia tidak boleh mengadu bahawa Akta tidak beraplikasi kepada kes ini dan sebaliknya membangkitkan peruntukan Akta untuk mendapatkan relif. Dengan itu, cabaran bidang kuasa tidak boleh dibuat pada bila-bila masa dan bukan hanya atas permohonan untuk mengetepikan award penghukuman (lihat perenggan 11–12 & 15–19).

(2) Dalam kes ini pandangan yang diambil oleh pengadil adalah untuk menyamakan litigasi 'previous' dengan litigasi 'on-going' atau timbang tara. Tiada ada yang penting terikat kepada perkataan 'commenced ... before' yang mana adalah perkataan-perkataan kelayakan yang nyata didapati di dalam s 41 Akta. Walau bagaimanapun, perkataan-perkataan 'commenced' dan 'before' seperti yang didapati di dalam s 41 Akta mempunyai maksud yang berbeza dan tidak patut disamakan dengan perkataan 'pending' didapati di tempat lain di dalam Akta. Dalam keadaan, kedua-dua pengadil dan Mahkamah Tinggi telah membaca s 41 Akta secara salah dengan mentafsirkan pengecualian di dalamnya sebagai beraplikasi kepada pertikaian bayaran yang belum di bayar. Pentafsiran ini telah menghadkan skop s 41 Akta dan bertentangan kepada niat operasinya sebagai peruntukan kecualian dan peralihan. Ia akan mencukupi untuk membuktikan hak pengecualian di bawah s 41 Akta jika pihak yang membayar menunjukkan bahawa tuntutan yang melitupi tuntutan ini telah terdahulunya dimulakan di mahkamah atau timbang tara kerana di dalam industri pembinaan, tuntutan kemajuan (atas mana sijil-sijil interim dikeluarkan) adalah bersifat kumulatif dan tidak wujud dalam ruang berdiri sendiri yang berasingan. Dalam kes ini, kontrak di antara pihak-pihak dan tuntutan-tuntutan kemajuan tidak berdiri sendiri di dalam ruang berasingan tetapi adalah bersifat kumulatif (lihat perenggan 22–36).

(3) Pengadil telah mengecualikan untuk mempertimbangkan tiga pembelaan penting yang dibangkitkan oleh perayu, kerana responden di dalam proses penghukuman, atas alasan bahawa ia tidak dinyatakan sebagai alasan di dalam jawapan bayaran pertama di bawah Akta, walaupun diplidkan di dalam jawapan penghukuman di hadapannya.

Pengadil tidak dikecualikan daripada mempertimbangkan kesemua pembelaan yang dibangkitkan oleh responden di dalam jawapan penghukuman sama ada didapati di dalam jawapan pertama di bawah s 6 Akta. Di mana pengadil telah gagal untuk berbuat sedemikian, dia telah dikatakan melanggar keadilan semula jadi. Berdasarkan ke atas pertimbangan teliti terhadap ss 6(4), 15, 24, 25, 26 dan 27 Akta ia adalah nyata bahawa pengadil yang telah secara salah menolak untuk mempertimbangkan pembelaan yang dikemukakan kepadanya adalah melanggar keadilan semula jadi. Dalam kes ini, pengadil telah secara salah mentafsir skop bidang kuasanya di bawah s 27(1) Akta dengan menolak untuk mempertimbangkan kesemua pembelaan yang dibangkitkan di dalam jawapan penghukuman. Oleh itu, keputusan sedemikian oleh pengadil tidak dapat dipertahankan (lihat perenggan 46, 51, 59–61, 64–66 & 74).

(4) Mahkamah Tinggi dan Mahkamah Rayuan dalam kes ini berpendapat bahawa penangguhan tidak terdapat kecuali perayu boleh menunjukkan bahawa responden tidak dapat emmbayar jumlah penghukuman. Ujian yang ketat sedemikian tidak berjustifikasi di bawah Akta. Pendekatan yang betul bagi penangguhan di bawah s 16 Akta adalah untuk menilai setiap kes atas meritnya tanpa belenggu ujian yang ditetapkan yang tidak didapati di dalam seksyen itu sendiri iaitu kapasiti kewangan kontraktor untuk membayar balik. Ia boleh menjadi faktor tetapi bukan faktor satu-satunya. Di bawah s 16 Akta mahkamah boleh menangguhkan keputusan penghukuman apabila terdapat kesilapan yang nyata, atau untuk mencapai keadilan kes individu dan apa-apa percubaan untuk menghalang permohonan s 16 Akta dalam cara yang dicadangkan oleh Mahkamah Tinggi, dan Mahkamah Rayuan, akan menanggalkannya daripada apa-apa kemudahan. Selanjutnya, ia adalah wajar secara keseluruhannya bahawa permohonan untuk penangguhan di bawah s 16 Akta difailkan bersama dengan permohonan untuk mengetepikan award di bawah s 15 Akta. Oleh itu, permohonan perayu untuk mengetepikan dan/atau menangguhkan award berikutan ss 15 dan 16 Akta patut dibenarkan dan permohonan responden untuk mendapatkan pendaftaran dan penguatkuasaan keputusan penghukuman patut ditolak (lihat perenggan 76–79, 81–84 & 88).]

Notes

For cases on building contract in general, see 3(3) Mallal's Digest (5th Ed, 2015) paras 3869–4077.

Cases referred to

Britnell v Secretary of State for Social Security [1991] 2 All ER 726, HL (refd)
Chip Hup Hup Kee Construction Pte Ltd v Ssangyong Engineering & Construction Co Ltd [2010] 1 SLR 658, HC (refd)

Lee Lee Cheng (F) v Seow Peng Kwang [1960] 1 MLJ 1, CA (refd)
Lim Phin Khian v Kho Su Ming [1996] 1 MLJ 1; [1996] 1 CLJ 529, FC (refd)
Multiplex Constructions Pty Ltd v Luikens and Anor [2003] NSWSC 1140, SC (refd)
Pilon Ltd v Breyer Group Plc [2010] All ER (D) 197 (Apr); [2010] EWHC 837 (TCC), QBD (not folld)
St Aubyn (LM) and Others v Attorney General (No 2) [1951] 2 All ER 473, HL (refd)
Terminal Perintis Sdn Bhd v Tan Ngee Hong Construction Sdn Bhd and another case [2017] MLJU 242, HC (refd)
Thompson Bedford v Teal, In Re (1889) 45 Ch D 161, CA (refd)
UDA Holdings Bhd v Bisraya Construction Sdn Bhd & Anor and another case [2015] 11 MLJ 499; [2015] 5 CLJ 527, HC (refd)
Walton In re Levy, Ex parte (1881) 17 Ch D 746, CA (refd)
WY Steel Construction Pte Ltd v Osko Pte Ltd [2013] 3 SLR 380, CA (refd)

Legislation referred to

Arbitration Act 1996 [UK] s 42
Building and Construction Industry Security of Payment Act 1999 [AUS] s 20(2B)
Building and Construction Industry Security of Payment Act 2006 [SG] ss 15, 15(3), 18
Construction Industry Payment and Adjudication Act 2012 ss 2, 3, 4, 5, 5(2)(b), 6, 6(2), (4), 8, 8(3), 9, 9(1), 10, 10(1), 11, 12, 15, 15(d), 16, 16(1)(a), (1)(b), 24, 24(c), 25, 26, 26(2)(c), 27, 27(1), (2), (3), 28, 32, 37(1), 41
Construction Contracts Act 2002 [NZ] ss 17, 73
Housing Grants, Construction and Registration Act 1966 [UK]
Scheme for Construction Contracts (England and Wales) Regulations 1998 [UK] regs 1, 20, 24

Cyrus Das (Chetan Jethwani and Goh Hui Ring with him) (Kumar Partnership) for the appellant.
Vinayak Pradhan (Foo Joon Liang, Tan Min Lee, Kwan Will Sen and Lee Xin Div with him) (Gan Partnership) for the respondent.

Zulkefli PCA (delivering judgment of the court):

BACKGROUND FACTS

[1] This is an appeal by the appellant against the decision of the Court of Appeal affirming the decision of the High Court in relation to three applications filed by the appellant and the respondent at the High Court on issues pertaining to the relevant provisions of the Construction Industry Payment and Adjudication Act 2012 ('the CIPAA').

[2] The three applications by way of originating summonses relate to the same adjudication claim and had been consolidated and heard together.

[3] The three applications are as follows:

(a) the first application was made by the appellant to challenge the jurisdiction of the adjudicator under the provision of s 41 of the CIPAA. The said s 41 reads as follows:

> 41 Savings
>
> Nothing in this Act shall affect any proceedings relating to any payment dispute under a construction contract which had been commenced in any court or arbitration before the coming into operation of this Act.

(b) the second application was made by the respondent seeking the registration and enforcement of the adjudication decision as a judgment of the court pursuant to s 28 of the CIPAA. The said s 28 reads as follows:

> 28 Enforcement of adjudication decision as judgment
>
> (1) A party may enforce an adjudication decision by applying to the High Court for an order to enforce the adjudication decision as if it is a judgment or order of the High Court.
>
> (2) The High Court may make an order in respect of the adjudication decision either wholly or partly and may make an order in respect of interest on the adjudicated amount payable.
>
> (3) The order made under subsection (2) may be executed in accordance with the rules on execution of the orders or judgment of the High Court.

(c) the third application was made by the appellant to set aside and/or stay the award of the adjudication pursuant to ss 15 and 16 of the CIPAA. The said ss 15 and 16 read as follows:

> 15 Improperly Procured Adjudication Decision
>
> An aggrieved party may apply to the High Court to set aside an adjudication decision on one or more of the following grounds:
>
> (a) the adjudication decision was improperly procured through fraud or bribery;
>
> (b) there has been a denial of natural justice;
>
> (c) the adjudicator has not acted independently or impartially; or
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> (d) the adjudicator has acted in excess of his jurisdiction.
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> 16 Stay of Adjudication Decision

(1) A party may apply to the High Court for a stay of an adjudication decision in the following circumstances:

(a) an application to set aside the adjudication decision under section 15 has been made; or

(b) the subject matter of the adjudication decision is pending final determination by arbitration or the court.

(2) The High Court may grant a stay of the adjudication decision or order the adjudicated amount or part of it to be deposited with the Director of the KLRCA or make any other order as it thinks fit.

[4] The learned judge of the High Court dismissed both of the appellant's applications and allowed the respondent's application to enforce the adjudication decision. The Court of Appeal affirmed all the three decisions of the High Court.

[5] The following are the questions of law approved by the Federal Court in this appeal:

(1) Whether a jurisdictional challenge as to the application of the Construction Industry Payment and Adjudication Act 2012 ('CIPAA') can be made any time by way of application or whether such an application can only be made upon the application to set aside an adjudication award under section 15 of the CIPAA;

(2) Whether section 41 of the CIPAA operates to exclude any proceedings from the operation of the CIPAA if the whole or any part of such a claim has been brought to court or arbitration prior to the coming into force of the CIPAA;

(3) Whether section 6(4) of the CIPAA allows a responding party to raise matters not raised in payment response under section 6(2) of the CIPAA during the filing of the adjudication response under section 10(1) of the CIPAA;

(4) If the answer to question (3) above is in the affirmative, whether the exclusion of a defence that has not been raised in the payment response under section 6(4) but raised under section10(1) of the CIPAA amounts to a denial of natural justice under section 15 of the CIPAA;

(5) Whether the adjudicator has the power under section 26 of the CIPAA to remedy any non-compliance with section 6(2) of the CIPAA;

(6) If the answer to question (5) is in the affirmative, whether the exclusion of a defence that has not been raised in the payment response under section 6(4) but raised under section 10(1) of the CIPAA amounts to a denial of natural justice under section 15 of the CIPAA;

(7) Whether an application for stay or partial stay on terms under section 16 of the CIPAA can be granted to remedy an injustice caused by a breach of

natural justice or errors arising in an adjudication award; and

(8) Whether an application for a stay under section 16 of the CIPAA can be made concurrently with an application to set aside an award under section 15 of the CIPAA or whether an application for a stay under section 16 of the CIPAA can only be made after an application to set aside an award under section 15 of the CIPAA is made.

DECISION OF THIS COURT

[6] This is an appeal on the scope and application of the CIPAA, a new legislation which came into force on 15 April 2014. It is noted that the CIPAA was enacted to introduce statutory adjudication to address lengthy payment times that affected the contractors in the construction industry. It is intended as an interim measure to ease the contractors' cash flow. This appeal also focusses on the transitional period when the CIPAA came into force and the exclusion from its ambit of claims already commenced, and further the decision-making process of the adjudicator under the CIPAA.

[7] The questions posed before this court can be classified and considered under the following three heads. Questions 1 and 2 will be classified and considered as the jurisdictional challenge under s 41 of the CIPAA. Questions 3, 4, 5 and 6 will be classified and considered as the alleged right of the adjudicator to exclude defences. Questions 7 and 8 will be classified and considered as the setting aside and stay issues.

[8] We shall first deal with the jurisdictional challenge under s 41 of the CIPAA. Section 41 seeks to exclude from its application a payment dispute that had been commenced in any court or arbitration as at the date of coming into operation of the CIPAA.

[9] The application of s 41 of the CIPAA had been earlier considered and decided by the High Court in the case of *UDA Holdings Bhd v Bisraya Construction Sdn Bhd & Anor and another case* [2015] 11 MLJ 499; [2015] 5 CLJ 527 which held that the CIPAA as a new act applied retrospectively. The High Court held that the CIPAA applies to construction contracts entered into before the coming into force of the CIPAA and also to payment disputes that arose before the enforcement of the CIPAA.

[10] It is significant to note that in the case of *UDA Holdings Bhd* the KLRCA as the body designated by the CIPAA as 'the adjudication authority' (see s 32) had itself propounded that this new Act should apply only to payment disputes that arise after the CIPAA has come into force. The High Court in *UDA Holdings Bhd* held that CIPAA has a full retrospective effect to cover both construction contracts and payment disputes that arose before

CIPAA came into force. In the result, it would appear that s 41 of the CIPAA is not only a 'saving provision' but also a 'transitional provision' as the CIPAA has been declared by case law to apply retrospectively to pre-existing payment disputes.

[11] In the present case, we noted that the application of s 41 of the CIPAA was considered fully by the High Court on its merits. Although learned counsel for the respondent seemed to contend that the Court of Appeal had dealt on its merits the s 41 question, we take the view that the Court of Appeal did not do so. The view taken by the Court of Appeal was a procedural one, namely that the application raising the s 41 issue should be dismissed in limine because it was brought as a separate application and not as an application under s 15 of the CIPAA to set aside the adjudication decision.

[12] With respect, we are of the view that the Court of Appeal was wrong as it failed to distinguish between a case where CIPAA did not apply at all and a case where the CIPAA applies but the adjudicator acting under the CIPAA had exceeded his jurisdiction. Section 15 of the CIPAA relates to the latter. Section 15 is predicated on the CIPAA applying to the case and to an adjudication decision made under the CIPAA. It relates specifically to a complaint that the adjudicator had 'acted in excess of his jurisdiction' presupposing the existence of the adjudicator's jurisdiction under the CIPAA in the first place.

[13] Learned counsel for the respondent contended that a s 15 of the CIPAA challenge can only be made after an Adjudication decision is given. There are no provisions in the CIPAA which allow a party to seek court intervention in the midst of adjudication.

[14] Learned counsel for the respondent fortified his argument that a s 15 of the CIPAA challenge can only be made after an adjudicator's decision is given by making reference to s 27 of the CIPAA as follows:

(a) s 27(1) of the CIPAA limits the jurisdiction of the adjudicator to matters raised in the payment claim and payment response, pursuant to ss 5 and 6 of the CIPAA respectively. s 27(2) of the CIPAA allows for that jurisdiction to be extended by agreement of the parties; and

(b) s 27(3) of the CIPAA gives the adjudicator a discretion to proceed with the adjudication even where a jurisdictional challenge has been raised, but preserves the right of the parties to apply to set aside the adjudication decision under s 15 of the CIPAA or to oppose the enforcement of that adjudication decision.

[15] We are of the view in substance, the 'jurisdiction' spoken of in s 15(d) of

A the CIPAA are in circumstances where CIPAA applies and where there is a dispute if the adjudicator has kept himself within his jurisdiction. Thus, by s 27(2) of the CIPAA the parties may by consent extend the jurisdiction of the adjudicator to decide on matters outside the claim on which he first acquired jurisdiction. This is possible only if the term 'jurisdiction' is used in the sense of
B CIPAA being applicable in the first place.

[16] The term 'jurisdiction' under the CIPAA is not used in the administrative or public law sense but in relation to matters within the scope of the CIPAA. On this point, in *Terminal Perintis Sdn Bhd v Tan Ngee Hong Construction Sdn Bhd and another case* [2017] MLJU 242 Lee Swee Seng J
C observed as follows (at para [70]):

> In the application of our CIPAA, we are free from the shackles of the language of administrative law and judicial review. The word 'jurisdiction' is used in s 15(d) as
D in the adjudicator having acted in 'excess of his jurisdiction' as a ground for setting aside an adjudication decision. It is also used in s 27(1) with respect to an adjudicator's jurisdiction being limited to the matters raised in the payment claim and the payment response. Then there is a reference to it in s 27(2) with respect to extending his jurisdiction by way of agreement in writing to deal with matters not specifically raised in the payment claim and payment response. Finally there is the
E reference to a 'jurisdictional' challenge, which when raised, does not prevent the adjudicator from proceeding and completing the adjudication without prejudice to the rights of any party to set it aside under s 15 or to oppose its enforcement under s 28 ... Issues as to whether there is a valid cause of action, does not go towards jurisdiction but rather to the merits of the claim ...

F

[17] The learned judge also made note of the various types of jurisdictional complaints within the CIPAA which may be categorised as core jurisdiction, competence jurisdiction and contingent jurisdiction. The common feature in all of them is the presupposition that the CIPAA applies to determine if the
G adjudicator had kept within his jurisdiction.

[18] We are in agreement with the contention of the appellant that the error in the judgment of the Court of Appeal is the failure to recognise that the jurisdictional complaint in the present case is that the CIPAA did not apply at
H all because of s 41, and not an 'excess of jurisdiction' under s 15, on the basis that CIPAA applied. It is what is termed as an absolute lack of jurisdiction that may be taken up at any time. On this point, the Singapore High Court case of *Chip Hup Hup Kee Construction Pte Ltd v Ssangyong Engineering & Construction Co Ltd* [2010] 1 SLR 658 had this to say:
I

> Thus, it seemed that when what was being alleged was an absolute lack of jurisdiction on the part of a particular tribunal or court to hear a particular dispute, 'jurisdiction' being used in the strict sense of capacity to hear, then if the tribunal concerned does not have such jurisdiction, any party to the dispute may assert the lack of jurisdiction at any stage and can never be held to be estopped from doing so

> or to have waived its right of protest. On the contrary, when it is a question of irregularity of procedure or contingent jurisdiction or non-compliance with a statutory condition precedent to the validity of a step in the litigation, such irregularity or non-compliance can be waived because the effect of the waiver would not be to create or confer any jurisdiction that did not previously exist.

[19] It is our considered view that the appellant had rightly not invoked s 15 of the CIPAA at the beginning in making its application to challenge jurisdiction because it could not on the one hand complain that CIPAA did not apply to the case and yet on the other hand invoke a provision of CIPAA to seek relief. In the circumstances, our answer to question 1 posed in this appeal is in the positive in the first part and negative in the second part.

[20] We shall now deal with question 2. Question 2 deals with the merits of the s 41 issue ie whether the CIPAA applies to the present case in view of the words in the section of a 'payment dispute ... *commenced* in any court or arbitration *before* the coming into operation of the Act'.

[21] The problem on this issue arises following the decision in the *UDA Holdings Bhd* that CIPAA applies retrospectively, not only to construction contracts made before the CIPAA came into force, but also to payment disputes arising before the CIPAA came into operation. In the result, in transitional cases like the present case, a determination has to be made each time under s 41 of the CIPAA whether the exclusion applies.

[22] As stated earlier, in the present case the Court of Appeal did not consider the issue on its merits. Both the adjudicator and the High Court had held that s 41 of the CIPAA did not exclude the present claim.

[23] The adjudicator merely ruled as follows:

> I find and hold that these CIPAA proceedings can proceed independently *despite previous and/or on-going litigation or arbitral proceedings* and I dismissed the respondent's section 41 challenge.

[24] It is significant that the view taken by the adjudicator was to equate 'previous' litigation with 'on-going' litigation or arbitration. There was no importance attached to the word 'commenced ... before' which are the express qualifying words found in s 41 of the CIPAA.

[25] The approach taken by the High Court was substantially similar to that of the adjudicator, which is to read s 41 of the CIPAA as applying to 'pending claims'. The High Court observed as follows:

> In short, the proceedings or the claims must be or is pending in Court or arbitration, in order to be 'saved' or exempted or excluded from the operation of CIPAA 2012. If there are no pending proceedings in Court or arbitration over that particular payment dispute, then it is not 'saved'. It will fall or come within the operation of CIPAA 2012.

(See para 36 of the judgment).

[26] Later in the judgment, the above position was reiterated by the High Court as follows:

> The intent behind section 41 is to preserve the law on payment disputes which are already pending in Court or arbitration; and not on all payment disputes. Since the two payment disputes are distinctly different, section 41 does not apply. ... Now, in order for the old law to continue to apply or operate, the proceedings which had been commenced must logically, still be pending completion. Otherwise, there would be no need for such a provision in the first place.

(See para 45 of the judgment).

[27] We are of the view that the word 'commenced' in s 41 of the CIPAA is not the same as the word 'pending' which is not found in s 41 of the CIPAA. It also ignores the word 'before' in s 41 of the CIPAA. If it was intended by the legislature that s 41 of the CIPAA should apply to 'pending' claims then such word should have been used as seen in s 16(1)(b) of the CIPAA or the word 'concurrently' in s 37(1) of the CIPAA in respect of ongoing claims. The words 'commenced' and 'before' as found in s 41 of the CIPAA, therefore have distinct meanings and not equated with the word 'pending' found elsewhere in the CIPAA.

[28] The argument against reading the words 'commenced' and 'before' as meaning 'pending' is strengthened by the context in which the words appear namely 'had been commenced ...'. It refutes any suggestion that the payment dispute must be pending or ongoing for it to be excluded. It is our considered view that both the adjudicator and the High Court had read s 41 of the CIPAA wrongly by interpreting the exclusion thereon as applicable to pending payment disputes. This interpretation has narrowed the scope of s 41 of the CIPAA and is contrary to its intended operation as a saving and transitional provision.

[29] It is important to note that such interim claims previously and at the time of commencement of the CIPAA were claims that could only be brought before the civil court or at an arbitration. The object of a saving provision is clear enough that is not to interfere with existing rights. *In Re Thompson Bedford v Teal* (1889) 45 Ch D 161, Cotton LJ observed (at p 173):

> A saving clause as a general rule is not intended to give power to a corporation or

> body to do something which they could not otherwise do, *but to prevent the enactment from interfering with rights already acquired.*

[30] A saving provision narrows the application of the new act and not enlarge it. In *Lim Phin Khian v Kho Su Ming* [1996] 1 MLJ 1; [1996] 1 CLJ 529 the Federal Court per Edgar Joseph FCJ observed (at p 14 (MLJ); p 538 (CLJ)):

> It is a well-known canon of construction that the intention of a saving provision is to narrow the effect of the enactment in which it is found so as to preserve some existing legal rule or right, as the case may be, from its operation.

[31] The saving provision is also a transitional provision. It is essentially temporary in duration and would become spent in the course of time in tandem with the new act which deals with the new circumstances. As observed by the House of Lords in *Britnell v Secretary of State for Social Security* [1991] 2 All ER 726 per Lord Keith it should not be read 'as widening the ambit of the substantive legislation' (at pp 729–730):

> The purpose of a transitional provision being to facilitate the change from one statutory regime to another, it could not properly be regarded as authorising innovation by widening the ambit of the substantive legislation. As Staughton LJ observed in the Court of Appeal, it is not possible to give a definitive description of what constitutes a transitional provision. In Thornton on Legislative Drafting (3rd Ed 1987) p 319 it is said:
>
> > The function of a transitional provision is to make special provision for the application of legislation to the circumstances which exist at the time when that legislation comes into force.
>
> One feature of a transitional provision is that its operation is expected to be temporary, in that it becomes spent when all the past circumstances with which it is designed to deal have been dealt with, while the primary legislation continues to deal indefinitely with the new circumstances which arise after its passage.

[32] We are of the view it would be sufficient to establish a right of exclusion under s 41 of the CIPAA if the paying party demonstrates that a claim covering the present claim had previously been commenced in court or arbitration. It is based on the fact that in the construction industry progress claims (on which interim certificates are issued) are cumulative in nature and do not exist in separate stand-alone compartments. It is the appellant's case that this is the position pertaining to the present appeal. On this point in Julian Bailey *Construction Law* (Vol 1) under the subchapter on 'progress payment', the learned author observed at para 6.59 as follows:

> As a matter of presentation, a progress claim may include the value of work previously performed for which payment has been made, even though amounts claimed and previously paid are no longer due and payable.

[33] In the contract between the parties here, the progress claims did not stand alone in separate compartments but were cumulative in nature. Learned counsel for the appellant submitted that this can be seen in the summary presentation of progress claims Nos 23–26 and the related interim certificates Nos 23–26R where the description of the contract works, to be noted, remains the same (subject to variation orders) but the amounts claimed vary according to work done to date and payment adjustments to date.

[34] It is the appellant's case that progress claim No 28 for the sum of RM23.8m which is the subject matter of the present payment dispute falls within the exclusion of s 41 of the CIPAA as a claim that 'had been commenced in court or arbitration before' the Act came into operation. The basis of this contention is that progress claim 28 is cumulative of earlier progress claims contained in interim certificates Nos 23–26R, in respect of which action had been commenced in Civil Suit No 22NCC-405–05 of 2013 ('the 405 Suit'). This was a suit commenced by the respondent in May 2013 against the appellant at the Kuala Lumpur High Court, making a claim for RM12,860,689.02 under the present contract, based on interim certificates Nos 23–26R.

[35] It is our judgment that s 41 of the CIPAA applies to exclude the respondent's claim under progress claim 28 for RM23.8m under the CIPAA. The matter falls under the words 'commenced' and 'before' in s 41 of the CIPAA and therefore applies to exclude the application of the CIPAA to the respondent's claim.

[36] For the above stated reasons we would answer question 2 posed in this appeal in the affirmative.

[37] We shall now deal with questions 3–6 posed in this appeal. These questions relate to whether the adjudicator has the right to exclude the defences of the appellant. The adjudicator excluded for consideration three vital defences raised by the appellant as the respondent in the adjudication process. They were in the nature of set-off and cross-claims towards reduction of the respondent's payment claim of RM23.8m. The excluded defences were:

(a) the fact of the advance of RM2m to the respondent;

(b) defective works and the cost of rectification; and

(c) encroachment into the adjoining land by the flyover bridge causing damage.

[38] The adjudicator justified the right to exclude for consideration three defences as they were not stated as reasons in the first payment response under

s 6 of the CIPAA, though pleaded in the adjudication response before him under s 10 of the CIPAA of the CIPAA. The adjudicator had evidently excluded the defences, relying on s 27(1) of the CIPAA, as a matter of jurisdiction. Section 27(1) reads as follows:

> 27 Jurisdiction of adjudicator
>
> (1) Subject to subsection (2), the adjudicator's jurisdiction in relation to any dispute is limited to the matter referred to adjudication by the parties pursuant to sections 5 and 6.

[39] The High Court agreed with the adjudicator and held that ss 5 and 6 of the CIPAA are determinative of jurisdiction, and that the adjudicator's jurisdiction did not extend to matters in the adjudication claims and the adjudication response or even the adjudication reply found in ss 9–11 of the CIPAA (see para 60 of the High Court judgment).

[40] The High Court justified its conclusion by reasoning out that the Adjudication pleadings under ss 9–11 of the CIPAA are merely 'manifestations' of the matters in ss 5 and 6 of the CIPAA. In the words of the High Court:

> the whole adjudication process that takes place after that from the appointment of the adjudicator to the filing of the adjudication claim, the adjudication response and the adjudication reply are substantially formal manifestations of the dispute containing greater details of the claim, response or reply, as the case may be of the first payment claim and payment response.

The Court of Appeal agreed fully with the High Court.

[41] With respect to the above reasoning of the High Court it is untenable to reduce the adjudication pleadings in ss 9–11 of the CIPAA to mere 'formal manifestations' of the dispute. If it were so, and speed is the overriding consideration under the CIPAA, it would be easier for the legislative draftsman to dispense altogether with adjudication pleadings and proceed purely on the statements contained in the payment claim and the payment response under ss 5 and 6 of the CIPAA.

[42] We are also doubtful if mere changes in the Adjudication pleadings from the time of the first documents under ss 5 and 6 of the CIPAA would delay the process because of the strict time line of a ten day period for parties to respond to each other's pleadings, and of the adjudicator's time line to deliver his decision within 45 working days from the last date of the documents being filed.

[43] It should also be noted that while the payment response under s 6(2) of the CIPAA requires the non-paying party to merely state 'amount disputed and the reasons for the dispute' the adjudication response under s 10 of the CIPAA

on the other hand requires the respondent to 'answer the adjudication claim'. The latter, is in our view is in the nature of a legal response with the obligation to 'answer' imposed by a statute, to mean a real opportunity to defend a claim, and not something illusory.

[44] It should be noted that on the claimant's side, the adjudication claim under s 9(1) of the CIPAA requires the unpaid party to state 'the nature and description of the dispute and the remedy sought' whereas the preceding payment claim under s 5 of the CIPAA merely requires him to state the amount claimed and the contract involved sufficient to 'identify the cause of action'.

[45] It needs to be emphasised here that the adjudication response under s 10(1) of the CIPAA requires the non-paying party to 'answer the adjudication claim' meaning the 'nature and description of the dispute and the remedy' as claimed by the claimant in its adjudication claim. It is also significant to note that it is at this stage of the proceedings that the unpaid party is termed by the CIPAA as 'the claimant', and the non-paying party as 'the respondent', by which terms they are thereafter respectively referred to. It comes about after the 'initiation of adjudication' under s 8 of the CIPAA where an adjudicator is appointed signifying the start of the adjudication process. The adjudication pleadings under ss 9–11 of the CIPAA comes after this and before the adjudication hearing begins under s 12 of the CIPAA.

[46] We are of the considered view that the scheme of the two stage process under the CIPAA does not warrant giving a reduced importance to the adjudication pleadings and a greater, if not overriding, significance given to the initial documents under ss 5 and 6 of the CIPAA.

[47] Learned counsel for the appellant impressed upon us that there is no express power given to the adjudicator to reject 'new' defences because they did not appear in the payment response, unlike, for example, in the counterpart legislations in Singapore and Australia (NSW).

[48] In Singapore under s 15(3) of the Building and Construction Industry Security of Payment Act 2006 ('the Singapore Act 2006') the adjudicator is expressly empowered not to consider 'any reason' for withholding payment unless 'the reason was included in the relevant payment response'. Section 15 of the Singapore Act 2006 comes under 'Adjudication Response', equivalent to our s 10 of the CIPAA but has this additional subsection:

> (3) The respondent shall not include in the adjudication response, and the adjudicator shall not consider, any reason for withholding any amount, including but not limited to any cross-claim, counterclaim and set-off, unless —

(a) where the adjudication relates to a construction contract, the reason was included in the relevant payment response provided by the respondent to the claimant; or ...

[49] The Singapore Court of Appeal in dealing with this sub-s (3) of s 15 of the Singapore Act 2006 in *WY Steel Construction Pte Ltd v Osko Pte Ltd* [2013] 3 SLR 380 held that it was a jurisdictional provision entitling the adjudicator to disregard grounds not originally stated by the respondent in his payment response. The Singapore court observed as follows:

> In our judgment, section 15(3) is jurisdictional in the sense that it curtails the power of an adjudicator to allow a respondent to raise new grounds for withholding payment that were not included in his payment response and, for that matter, an adjudicator's power even to consider such grounds at all. This is literally what the provision provides and we should, in our view, give proper effect to it.

[50] The Australian (NSW) provision similar to the Singapore provision is s 20(2B) of the New South Wales Building and Construction Industry Security of Payment Act 1999 which reads:

> The respondent *cannot include* in the adjudication response any reasons for withholding payment *unless* those reasons have *already been included* in the payment schedule provided to the claimant. (Emphasis added.)

In *Multiplex Constructions Pty Ltd v Luikens and Anor* [2003] NSWSC 1140, the NSW Supreme Court read the provision as entitling the adjudicator to prevent the respondent from relying on reasons not stated in the initial response. The court observed as follows:

> If the respondent has any reason whatsoever for withholding payment of all or any part of the payment claim, section 14(3) requires that that reason be indicated in the payment schedule and section 20(2B) prevents the respondent from relying in its adjudication response upon any reason not indicated in the payment schedule. Correspondingly, section 22(d) requires the adjudicator to have regard only to those submissions which have been 'duly made' by the respondent in support of the payment schedule, that is, made in support of a reason for withholding payment which has been indicated in the payment schedule in accordance with s 14(3).

[51] In the present case, the right to disregard the so called new grounds is not based on any express power vested in the adjudicator as in Singapore or Australia but solely by a reliance on s 27(1) of the CIPAA which says the jurisdiction 'in relation to any dispute is limited to the matter referred to the adjudicator pursuant to sections 5 and 6'. There is therefore the need to determine the scope of the jurisdictional limitation under s 27(1) of the CIPAA and whether it justifies the adjudicator to exclude defences raised by a respondent.

[52] In the context and application of s 27(1) of the CIPAA, the distinction between 'jurisdiction' and 'powers' must be recognised. It is trite that they mean different things when both words appear in the same statute as it does in the present act. On this point in *Lee Lee Cheng (F) v Seow Peng Kwang* [1960] 1 MLJ 1, Thomson CJ observed at p 3:

> It is axiomatic that when different words are used in a statute they refer to different things and this is particularly so where the different words are, as here, used repeatedly. This leads to the view that in the Ordinance there is a distinction between the jurisdiction of a court and its powers, and this suggests that the word 'jurisdiction' is used to denote the types of subject matter which the court may deal with and in relation to which it may exercise its powers. It cannot exercise its powers in matters over which, by reason of their nature or by reason of extra-territoriality, it has no jurisdiction. On the other hand, in dealing with matters over which it has jurisdiction, it cannot exceed its powers.

[53] The significance of the divide between 'jurisdiction' and 'powers' lies in the fact that 'jurisdiction' relates to 'the types of subject matter which the court may deal with' whereas its powers may be exercised only in relation to that jurisdiction.

[54] The principle that jurisdiction is about subject-matter applies to every statute. Thus, the CIPAA applies only to 'construction contracts' as defined under the Act (see ss 2, 3 and 4) and that the 'payment dispute' must arise under a construction contract. These are fundamental jurisdictional premises for the CIPAA to apply. Sections 5 and 6 of the CIPAA relate to this. Section 5 of the CIPAA speaks of a 'payment pursuant to a construction contract'. By s 4 of the CIPAA, 'payment' is defined as 'payment for work done ... under the express terms of a construction contract'. The response under s 6 of the CIPAA has to be in relation to the 'payment' claim under ss 4 and 5 of the CIPAA as to whether it is admitted or disputed.

[55] By s 27(1) of the CIPAA, the arbitrator's jurisdiction 'is limited to the matter referred to adjudication' pursuant to ss 5 and 6 of the CIPAA. It refers to the 'identification of the cause of action' in relation to the construction contract as required under s 5(2)(b) of the CIPAA. In turn, the payment response under s 6 of the CIPAA is defined and limited by the claim under s 5 of the CIPAA.

[56] In short, s 27(1) of the CIPAA refers to the subject matter of the claim under s 5 of the CIPAA, which is the 'cause of action' identified by the claimant by reference to the applicable clause of the construction contract. Thus if the payment claim relates to progress claim No 28 (as in the present case) the jurisdiction of the adjudicator is limited to this progress claim and nothing else. The payment response is likewise limited to an answer to progress claim No 28.

[57] It can thus be said that the appellant's case regarding the jurisdiction referred to in s 27(1) of the CIPAA, is the subject matter of the claim and the cause of action as that identified under the relevant provision of the construction contract. By s 27(2) of the CIPAA, the parties may by consent extend the jurisdiction of the adjudicator to cover other matters. A typical example will be that of other progress claims falling due before the adjudication commences. Section 27(1) of the CIPAA has nothing to do with the grounds of the claim or the reasons for opposing the claim.

[58] In contrast to jurisdiction, the 'powers' of the adjudicator are listed in ss 25 and 26 of the CIPAA under the specific heading of 'Powers of the Adjudicator'. It follows that an adjudicator may exercise all or any of the powers under ss 25 and 26 of the CIPAA so long as he keeps within his jurisdiction in adjudicating only the subject matter referred to him pursuant to ss 5 and 6 of the CIPAA.

[59] We are of the view that in the absence of a prohibitory clause similar to s 15(3) of the Singapore Act 2006 and a similar restriction as above mentioned the NSW legislation, there is no impediment for the adjudicator to consider all the grounds of claim in an adjudication claim under s 9 of the CIPAA, and all the grounds of defence in an Adjudication Response under s 10 of the CIPAA.

[60] The impact of s 6(4) of the CIPAA should also be considered. The provision states that if a non paying party fails to respond to the payment claim served on him he is 'deemed to have disputed the entire payment claim'. The High Court in the present case treated s 6(4) of the CIPAA as something equivalent to an anti-default judgment provision which merely gives 'comfort' to the respondent (see para 67 of judgment). With respect we are of the view that the approach of the High Court fails to give due regard to the section as a 'deeming' provision in legislation. The word 'deemed' used in a statutory provision is a legislative presumption of something having happened although it did not. It is a statutory fiction given reality by law. In *St Aubyn (LM) and Others v Attorney General (No 2)* [1951] 2 All ER 473, Lord Radcliffe observed at p 53:

> The word 'deemed' is used a great deal in modern legislation. Sometimes it is used to impose for the purposes of a statute an artificial construction of a word or phrase that would not otherwise prevail. Sometimes it is used to put beyond doubt a particular construction that might otherwise be uncertain. Sometimes it is used to give a comprehensive description that includes what is obvious, what is uncertain and what is, in the ordinary sense, impossible.

In relation to something not done the word 'deemed' would have the meaning given by James LJ in *Ex parte Walton In re Levy* (1881) 17 Ch D 746 which read as follows:

A When a statute enacts that something should be 'deemed' to have been done which, in fact and truth, was not done, the court is entitled and bound to ascertain for what purposes and between what persons the statutory fiction is to be resorted to.

B **[61]** We are of the considered view that the High Court has wrongfully reduced the significance of the 'deeming' effect in s 6(4) of the CIPAA. Further the interpretation that s 6(4) of the CIPAA would only entitle the respondent to dispute the claim as it stands, and not raise any positive defence, is to whittle down the effect of the deeming provision.

C **[62]** Useful reference can also be made to the observation of learned authors of Lam Wai Loon and Ivan YF Loo in *Construction Adjudication in Malaysia* (KL CCH Asia 2013) wherein they observe at p 150 that the effect of s 6(4) of the CIPAA is that it does not prevent the respondent from submitting any D defence available to him by way of an adjudication response.

[63] It must also be noted that CIPAA does not require the participation of lawyers in the system devised. By s 8(3) of the CIPAA parties may represent themselves or be represented by 'any representative'. Thus, by ss 15 and 24 of E the CIPAA there is a safeguard which declares that the adjudicator shall conduct himself with fairness, impartiality and due observance of the rules of natural justice.

F **[64]** It follows that the 'duty and obligation of the adjudicator' as spelt out in s 24(c) of the CIPAA that 'he shall comply with the principles of natural justice' would oblige him to consider all the defences raised by the appellant in its adjudication response as a matter of fairness and impartiality.

G **[65]** We are of the view that an adjudicator who wrongly rules out considering a defence presented to him would be in breach of natural justice. This point arose in *Pilon Ltd v Breyer Group Plc* [2010] All ER (D) 197 (Apr); [2010] EWHC 837 (TCC) which like in our present case was concerned with progress claims that were cumulative in nature. The decision by H Justice Coulson bears close reading. At paras [24]–[28] the learned judge observed:

[24] It seems to me clear beyond doubt that the adjudicator erred in failing to take into account *Breyer*'s defence by reference to the over-payment on batches 1–25. Whilst he was quite correct to regard the notice of adjudication as setting out the I boundaries of his jurisdiction, he failed to appreciate that what *Pilon* were seeking by that notice was not only an interim valuation of batches 26–62, but also an interim payment of any sum considered owing to them. Whilst the valuation required him to have regard to batches 26–62 only, the concomitant claim for payment meant that the adjudicator was obliged to consider whether *Breyer* were right to say that a much smaller net payment was due than that contended for by

Pilon, because *Pilon* had already been overpaid on batches 1–25. In other words, the notice of adjudication gave the adjudicator the jurisdiction to consider what, if any, further sum should be paid by way of interim payment from *Breyer* to *Pilon* and that issue, of necessity, involved a consideration of *Breyer*'s defence based on the alleged over-payment on batches 1–25.

[25] It is not uncommon for adjudicators to decide the scope of their jurisdiction solely by reference to the words used in the notice of adjudication, without having regard to the necessary implications of the words: that was, for example, what went wrong in *Broardwell*. Adjudicators should be aware that the notice of adjudication will ordinarily be confined to the claim being advanced; it will rarely refer to the points that might be raised by way of a defence to that claim. But, subject to questions of withholding notices and the like, a responding party is entitled to defend himself against a claim for money due by reference to any legitimate available defence (including set-off), and thus such defences will ordinarily be encompassed within the notice of adjudication.

[26] As a result, an adjudicator should think very carefully before ruling out a defence merely because there was no mention of it in the claiming party's notice of adjudication. That is only common sense: it would be absurd if the claiming party could, through some devious bit of drafting, put beyond the scope of the adjudication the defending party's otherwise legitimate defence to the claim.

[27] I understand that it may be tempting for a claiming party in an adjudication to seek to limit the adjudicator's jurisdiction in a way in which that party believes to be to its advantage. I am in no doubt that is what happened here: *Pilon* did not wish the adjudicator to have any regard to batches 1–25, and therefore deliberately limited the scope of the adjudication notice to batches 26–62. It was their case that the over-payment claim was outside the adjudicator's jurisdiction, and that is what they (successfully) urged on the adjudicator. Thus, this is a case where *Pilon* sought a tactical advantage by putting forward an erroneous statement of the adjudicator's jurisdiction and, as the decision in *Quartzelec* shows that can be a dangerous tactic to adopt.

[28] In the result therefore, I consider that the adjudicator deliberately placed an erroneous restriction on his own jurisdiction, which amounted to a breach of natural justice ...

[66] Based on the above decision of *Pilon Ltd* the adjudicator had likewise in our case, wrongly construed the scope of his jurisdiction under s 27(1) of the CIPAA in refusing to consider all the defences raised in the adjudication response. Therefore such a decision by the adjudicator cannot stand.

[67] On the applicability of *Pilon Ltd*'s case to the present case learned counsel for the respondent contended that the adjudicator in England is not constrained by a s 27(1) of the CIPAA like provision on his jurisdiction. *Pilon Ltd* was decided based on the English Housing Grants, Construction and Registration Act 1966 ('the HGCR Act'). The adjudication provisions of the HGCR Act are contained in the Scheme for Construction Contracts (England and Wales) Regulations 1998 ('the Scheme'). Regulation 20 of the Scheme

expressly allows the adjudicator to take into account any other matter which the parties to the dispute agree should be within the scope of the adjudication or which are matters under the contract which he considers are necessarily connected with the dispute.

[68] Learned counsel for the respondent also submitted that there is no requirement for the equivalent of a payment claim and payment response in England. The adjudication is commenced by a notice of Adjudication (see reg 1 of the Scheme). It is because the adjudicator was obliged under reg 20 of the Scheme to consider matters 'necessarily connected with the dispute' that the court in *Pilon Ltd* found the adjudicator to have wrongfully excluded for his consideration the overpayment on batches 1–25 in his valuation of batches 26–62.

[69] It is the respondent's contention that in any event in *Pilon Ltd*, the valuation of batches 26–62 is an accounting of the value of work done against sums paid. Previous payments, including that for batches 1–25, must be considered. The present case is quite different wherein the appellant is seeking to include cross-claims that were not raised in its payment response under s 6 of the CIPAA.

[70] With respect to the above arguments advanced for the respondent on the applicability of *Pilon Ltd* to the present case we are of the considered view that it is incorrect to suggest, as the respondent did, that because of reg 20 of the Scheme, the adjudicator has wider power under the HGCR Act, and that *Pilon Ltd* cannot apply. Regulation 20 in full states:

> 20 Adjudicator's decision
>
> The adjudicator shall decide the matters in dispute. He may take into account any other matters which the parties to the dispute agree should be within the scope of the adjudication or which are matters under the contract which *he considers are necessarily connected with the dispute*. In particular, he may —
>
> (a) open up, revise and review any decision taken or any certificate given by any person referred to in the contract unless the contract states that the decision or certificate is final and conclusive,
>
> (b) decide that any of the parties to the dispute is liable to make a payment under the contract (whether in sterling or some other currency) and, subject to section 111(4) of the Act, when that payment is due and the final date for payment,
>
> (c) having regard to any term of the contract relating to the payment of interest decide the circumstances in which, and the rates at which, and the periods for which simple or compound rates of interest shall be paid. (Emphasis added.)

[71] We are in agreement with the submission of learned counsel for the appellant that reg 20 of the Scheme is about the powers of the adjudicators in making their decision and not their jurisdiction. Under the HGCR Act, the adjudicators first have to determine their jurisdiction by reference to the scope of the 'dispute' that is referred to them. That relevant part of the HGCR Act and the Scheme that was under consideration in *Pilon Ltd* was reg 1 which provides:

> 1 Notice of Intention to seek Adjudication
>
> (1) Any party to a construction contract (the 'referring party') may give written notice (the 'notice of adjudication') of his intention to refer any dispute arising under the contract, to adjudication.
>
> (2) The notice of adjudication shall be given to every other party to the contract.
>
> (3) The notice of adjudication shall set out briefly —
>
> (a) the nature and a brief description of the dispute and of the parties involved,
>
> (b) details of where and when the dispute has arisen,
>
> (c) the nature of the redress which is sought, and
>
> (d) the names and addresses of the parties to the contract (including, where appropriate, the addresses which the parties have specified for the giving of notices).

[72] This means that the adjudicator must look to the 'notice of adjudication' to first determine the jurisdiction of the dispute that is referred to them. This is made clear in *Pilon Ltd* itself as at paras 24–25 of the judgment. It is also incorrect to say that the present case is different from *Pilon Ltd* because *Pilon Ltd* was dealing with an accounting of previous payments. In *Pilon Ltd* the excluded defence was one of overpayment and an accounting of what was due. In the present case before the court, one of the appellant's excluded defences was an overpayment of RM2m which was not accounted for.

[73] It is noted that in the supporting judgment in the Court of Appeal of Prasad Sandosham Abraham JCA (as he then was) the learned judge held that s 26(2)(c) of the CIPAA could have been invoked by the appellant to amend his case before the adjudicator. On this point we are of the view that this remedy was not necessary on the facts of the present case because the adjudication response was 'a document produced in the adjudication proceedings' under the said section and it had carried all the defences sought to be relied on by the appellant. It did not call for any amendment.

[74] For the reasons above stated it is our considered view that an adjudicator is not excluded from considering all the defences raised by a respondent in the adjudication response whether found in the first response under s 6 of the CIPAA or not. In the circumstances of this case, the adjudicator had acted in breach of natural justice in excluding and refusing to consider certain defences raised by the appellant, and his decision cannot stand for that reason.

[75] We shall now deal with questions 7 and 8 relating to the setting aside and stay issues. Questions 7 and 8 relate to the interplay between ss 15 and 16 of CIPAA. Question 7 deals with the court's powers under s 16 of the CIPAA. Question 8 deals with the timing of an application under s 16 of the CIPAA.

[76] The High Court in the present case held that an application under s 16 of the CIPAA can only be allowed in exceptional circumstances. These exceptional circumstances were then described as necessarily relating 'to the financial aspects of payment or repayment; as it is the whole concept behind adjudication and payment disputes'.

[77] The reasoning adopted by the High Court for such a stringent test was that it took into account the object and purpose of CIPAA to provide for quick payment through adjudication and that it was the approach favoured by the courts in England, Australia and Singapore. The court placed much emphasis on the decision of the Singapore Court of Appeal in *WY Steel Construction Pte Ltd*.

[78] The Court of Appeal in the present case adopted a similar approach. It said that unless there was 'overwhelming evidence' that the contractor would be unable to meet its contractual obligations as well as meet its financial obligations to the employer, a stay ought not to be granted.

[79] We are of the view that such a stringent test is not justified under the CIPAA because s 16 of the CIPAA itself contains no such limiting requirement or intent. Section 16 of the CIPAA should be treated as one of the safeguards to a likely wrongful adjudication decision and which empowers the court to find a suitable middle ground in cases where there has been clear and unequivocal errors.

[80] It is to be noted that after a review of the legislation in the other jurisdictions, the scheme in each jurisdiction is different. Other jurisdictions do review the adjudication awards, and where appropriate, deny enforcement in whole or in part. It can be seen as follows:

(a) in England, statutory adjudication is governed by the HGCR Act and the Scheme and the Arbitration Act 1996. Under reg 24 of the Scheme

an order of the adjudicator may be enforced by reference to s 42 of the UK Arbitration Act. At the application for enforcement, the responding party may seek to resist the enforcement on the grounds of want of jurisdiction of the adjudicator or a breach of natural justice;

(b) in Australia, different states have different statutory adjudication schemes. In the state of Victoria in Australia where there is a failure to respond to a payment claim the claiming party must apply for leave to enter judgment at which point a court can review the claim. There is a provision for a court based review of the adjudicator's decision. Apart from that, judicial review or certiorari is available to challenge any adjudication decision. This includes challenging an adjudication decision by using Wednesbury unreasonableness. Importantly, Victoria, Australia, provides for an automatic stay after an adjudication decision, on the launching of arbitration to challenge the award subject to security being provided by the responding party;

(c) in New Zealand the scheme is again different under the Construction Contracts Act 2002. Here the claiming party is entitled to seek statutory adjudication on progress payment. Those progress payments are statutorily defined under s 17 of the Act to include an accounting of defective works and liquidated ascertained damages. Once an adjudication decision is delivered, s 73 of the Act sets out the steps for applying to court for judgment for enforcement of the award. This is apart from the right of the responding party to seek judicial review against the award; and

(d) in Singapore there is a specific provision under s 18 of the Singapore Act 2006 which allows for review of adjudication awards. It is after the review process concludes that the claiming party must then apply to court for an order of enforcement.

[81] From observations made on the laws from the other jurisdictions, an adjudication award can be reviewed and challenged in a variety of ways. A stay application in other jurisdictions is made only when the other avenues for review and challenge to the award are exhausted. It therefore makes sense that applications for stay in other jurisdictions are rarely granted. We are of the view that it is however not right to rely on those decisions to justify restricting the statutory power of stay in Malaysia simply on the financial status of the other party. The CIPAA contains no such restriction.

[82] We are in agreement with the contention of the appellant that a more liberal reading of s 16 of the CIPAA would allow some degree of flexibility to the courts to stay the award where there are clear errors, or to meet the justice of the individual case. It is accepted that a stay of the award ought not be given readily and caution must be exercised when doing so. However to restrict the

application of s 16 of the CIPAA in the manner proposed by the High Court, and the Court of Appeal, would be to strip it of any utility.

[83] It is our considered view that on the facts of this case that the appellant was deprived of three of its defences. Of the three at least two defences relate directly to the amount that was being claimed by the respondent. Those are:

(a) the undisputed advance payment of RM2m; and

(b) the cost of rectification of defective works in the amount of RM1.3m.

[84] The High Court and the Court of Appeal in the present case took the view that no stay was available unless the appellant could show that the respondent was unable to repay the adjudication sum. With respect we are of the view that the correct approach for the High Court under s 16 of the CIPAA would be to evaluate each case on its merits without the fetter of a pre-determined test not found in the section itself namely the financial capacity of the contractor to repay. It could be a factor but not the only factor.

[85] As regards question 8, the Court of Appeal held that an application under s 16 of the CIPAA for stay could only be made after the filing of an application under s 15 of the CIPAA. We are of the view that the Court of Appeal fell into error here when it failed to consider that the application for stay was made under s 16(1)(b) and not s 16(1)(a) of the CIPAA. In any event, s 16(1)(a) specifically provides that the parties may apply for a stay once an application to set aside an award under s 15 of the CIPAA has been made. It does not say that the application must be made separately. It is clear that the provision is there in aid of an application under s 15.

[86] It is wholly appropriate that an application for stay under s 16 of the CIPAA be filed together with an application to set aside an award under s 15 of the CIPAA as a matter of practical utility for the High Court to make the appropriate order in a joint consideration of both.

[87] For these reasons it is our view that questions 7 and 8 should both be answered in the affirmative.

CONCLUSION

[88] For all the above reasons the appeal of the appellant is allowed with costs. The orders made by the High Court and affirmed by the Court of Appeal are hereby set aside. The appellant's application to challenge the jurisdiction of the adjudicator under the provision ofs 41 of the CIPAA is allowed. The appellant's application to set aside and/or stay the award pursuant to ss 15 and

16 of the CIPAA is also allowed. The respondent's application seeking the registration and enforcement of the adjudication decision as a judgment of the court pursuant to s 28 of the CIPAA is dismissed. Deposit is to be refunded to the appellant.

Appeal allowed with costs.

Reported by Kohila Nesan